

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAMES CRAMER,

Plaintiff,

v.

JEFF MACOMBER, *et al.*,

Defendants.

Case No. 1:23-cv-01712 KES EPG (PC)

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT PLAINTIFF'S IFP
STATUS BE REVOKED AND THAT
PLAINTIFF BE REQUIRED TO PAY THE
FILING FEE IN FULL IF HE WANTS TO
PROCEED WITH THIS ACTION

(ECF Nos. 2, 7)

OBJECTIONS, IF ANY, DUE WITHIN
THIRTY DAYS

Plaintiff James Cramer is incarcerated at California Substance Abuse Treatment Facility (CSATF) and is proceeding *pro se* in this action filed on December 13, 2023. (ECF No. 1). The Court screened the complaint, found that it stated no cognizable claims, and gave Plaintiff leave to amend on July 15, 2024. (ECF No. 10). Plaintiff filed a First Amended Complaint on September 9, 2024. (ECF No. 13).

Along with his complaint, Plaintiff also filed an application to proceed *in forma pauperis* (IFP) in this action (ECF No. 2), which the Court granted on December 28, 2023 (ECF No. 7).

Because the Court concludes that Plaintiff had at least three "strikes" prior to filing this action and because he was not in imminent danger of serious physical injury at the time he filed it, the Court finds that Plaintiff's motion to proceed *in forma pauperis* was improvidently granted, and recommends that Plaintiff's IFP status be revoked and Plaintiff be required to pay the \$405 filing fee in full if he wants to continue to proceed with the action.

I. IFP STATUS

“IFP status is not a constitutional right.” *Rodriguez v. Cook*, 169 F.3d 1176, 1180 (9th Cir. 1999); *Smart v. Heinze*, 347 F.2d 114, 116 (9th Cir. 1965) (“To proceed *in forma pauperis* is a privilege not a right.”). The grant or refusal of permission to proceed *in forma pauperis* is left to the sound discretion of the district court. *Smart*, 347 F.2d 114, 116 (9th Cir. 1963) (citing *Weller v. Dickson*, 314 F.2d 598 (9th Cir. 1963)). The latitude given a district court in such matters is especially broad in civil actions by prisoners against their wardens and other officials. *Smart*, 347 F.2d at 116 (footnote citation omitted); *Shobe v. People of State of California*, 362 F.2d 545, 546 (9th Cir. 1966) (citing *Smart*).

An inmate’s *in forma pauperis* status may be revoked at any time if the court, either *sua sponte* or on a motion, determines that the status was improvidently granted. *Spencer v. Milan*, No. 1:20-CV-00682 JLT GSA PC, 2024 WL 201135, at *1 (E.D. Cal. Jan. 17, 2024) (citing *Keeton v. Marshall*, No. CV 17–01213 FMO, 2018 WL 4381543, at *6 (C.D. Cal. June 8, 2018); *Owens v. Matthews*, No. CV 16–07755 JFW, 2017 WL 603183, at *2 (C.D. Cal. Jan. 6, 2017)); *Wright v. Rodriguez*, No. 1:23-CV-01586 GSA (PC), 2024 WL 4973213, at *1 (E.D. Cal. Sept. 30, 2024), *report and recommendation adopted*, No. 1:23-CV-01586 JLT GSA (PC), 2024 WL 4892026 (E.D. Cal. Nov. 26, 2024) (*sua sponte* recommending that plaintiff’s IFP status be revoked).

II. THREE-STRIKES PROVISION OF 28 U.S.C. § 1915(g)

Pertinent here is the “three strikes provision” of 28 U.S.C. § 1915:

In no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). In determining whether a dismissal counts as a “strike” under § 1915(g), “the reviewing court looks to the dismissing court’s action and the reasons underlying it. . . . This means that the procedural mechanism or Rule by which the dismissal is accomplished, while informative, is not dispositive.” *Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013) (internal citation omitted). The Ninth Circuit has “interpreted the final form of dismissal under the statute,

1 ‘fail[ure] to state a claim upon which relief may be granted,’ to be essentially synonymous with a
 2 Federal Rule of Civil Procedure 12(b)(6) dismissal.” *Id.* (alteration in original).

3 Section 1915(g) also applies to dismissals of actions mislabeled as habeas petitions, when
 4 in fact, the so-called habeas petition is in fact a 42 U.S.C. § 1983 complaint. *El-Shaddai v.*
 5 *Zamora*, 833 F.3d 1036, 1047 (9th Cir. 2016) (citing *Andrews v. King*, 398 F.3d 1113, 1122–23 &
 6 n.12 (9th Cir. 2005)). The Ninth Circuit has “recognized that some habeas petitions may be little
 7 more than 42 U.S.C. § 1983 actions mislabeled as habeas petitions so as to avoid the penalties
 8 imposed by 28 U.S.C. § 1915(g).” *Id.* (internal quotation marks omitted). In those cases, the
 9 Ninth Circuit has held that “it would be proper for the district court to determine that the
 10 dismissal of the habeas petition does in fact count as a strike for purposes of § 1915(g).” *Id.*

11 In addition, “when (1) a district court dismisses a complaint on the ground that it fails to
 12 state a claim, (2) the court grants leave to amend, and (3) the plaintiff then fails to file an
 13 amended complaint, the dismissal counts as a strike under § 1915(g).” *Harris v. Mangum*, 863
 14 F.3d 1133, 1143 (9th Cir. 2017); *see also O’Neal v. Price*, 531 F.3d 1146, 1156 (9th Cir. 2008)
 15 (dismissal for failure to state a claim and another ground counts as a strike when it is clear from
 16 the court’s reasoning that it considers failure to state a claim to be a fully sufficient condition to
 dismiss the action).

17 **III. ANALYSIS**

18 **A. Strikes**

19 The Court takes judicial notice¹ of the following cases filed by Plaintiff and dismissed
 20 prior to commencing this action:

- 21 (1) *Cramer v. Wooford et al.*, 3:04-cv-04707-MMC (N.D. Cal. Jan. 19, 2006) (dismissed
 22 for failure to file an amended complaint following a screening order dismissing
 23 complaint for failure to state a claim);
- 24 (2) *Cramer v. Neuschmid et al.*, 5:20-cv-00896-EJD (N.D. Cal. Apr. 11, 2020) (dismissed
 25 for failure to file an amended complaint following a screening order dismissing
 26 complaint for failure to state a claim);

27 ¹ “In particular, a court may take judicial notice of its own records in other cases” *United*
 28 *States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

1 (3) *Cramer v. Ducart, et al.*, 4:17-cv-01034-JST (N.D. Cal. Apr. 28, 2017) (habeas
2 petition dismissed as a mislabeled § 1983 action).

3 (4) *Cramer v. Frauenheim*, 4:17-cv-02997-JST (N.D. Cal. July 11, 2017) (habeas petition
4 dismissed as a mislabeled § 1983 action).

5 With respect to *Ducart* and *Frauenheim*—the two habeas petitions dismissed as
6 mislabeled § 1983 actions—the Court makes the following additional findings.

7 In *Ducart*, Plaintiff filed a habeas petition on February 28, 2017. Petition, ECF No. 1,
8 *Ducart*, 4:17-cv-01034-JST (N.D. Cal. Feb. 28, 2017). He alleged that, because his legal
9 materials “from active state appeal no. H034348/Case No. 21208” were seized and confiscated,
10 he was deprived of access to courts and denied “his right to speak freely and petition the
11 government.” *Id.* at 6. In its order dismissing the petition, the *Ducart* court explained that
12 Plaintiff’s allegations challenged conditions of Plaintiff’s confinement rather than “the lawfulness
13 or duration of petitioner’s incarceration.” *See* Order of Dismissal, ECF No. 7 at 1, *Ducart*, 4:17-
14 cv-01034-JST (N.D. Cal. Apr. 28, 2017). The *Ducart* court concluded that Plaintiff’s “claim is
15 not the proper subject of a habeas action, but must be brought as a civil rights case under 42
16 U.S.C. § 1983” and dismissed Plaintiff’s petition on April 28, 2017. *Id.*

17 Less than a month later, Plaintiff filed a habeas petition in the same court, again alleging
18 that his legal documents “from active case no. H034348/211208” were seized. Petition, ECF No.
19 1 at 6, *Frauenheim*, 4:17-cv-02997-JST (N.D. Cal. May 24, 2017). The district court again
20 dismissed the petition because Plaintiff did not challenge the lawfulness or duration of his
21 incarceration and, instead, challenged his conditions of his confinement. *See* Order of Dismissal,
22 ECF No. 9 at 1, Case No. 4:17-cv-02997-JST, *Frauenheim*. Thus, as in *Ducart*, the *Frauenheim*
23 court concluded that Plaintiff’s “claim is not the proper subject of a habeas action, but must be
24 brought as a civil rights case under 42 U.S.C. § 1983.” *Id.*

25 As noted by the Ninth Circuit in *El-Shaddai*, where a Section 1983 action is mislabeled as
26 a habeas petition to avoid Section 1915(g)’s penalties, the district court may “determine that the
27 dismissal of the habeas petition does in fact count as a strike.” 833 F.3d at 1047 (quoting
28 *Andrews*, 398 F.3d at 1122 n.12)). The court reasoned that as “recognized in *Andrews*, [courts]

1 should look to the substance of the dismissed lawsuit in order to determine whether it can be
2 counted as a ‘strike.’” *Id.* at 1047.

3 The substance of Plaintiff’s habeas corpus petitions in *Ducart* and *Frauenheim* challenged
4 only conditions of confinement, a quintessential Section 1983 claim, rather than the validity or
5 duration of his confinement. A habeas corpus petition is limited to challenges to the validity or
6 duration of a prisoner’s confinement. *See Preiser v. Rodriguez*, 411 U.S. 475, 489–98 (1973); *see*
7 *also Ramirez v. Galaza*, 334 F.3d 850 859 (9th Cir. 2003). Conversely, “a § 1983 action is the
8 exclusive vehicle for claims brought by state prisoners that are not within the core of habeas
9 corpus.” *Nettles v. Grounds*, 830 F.3d 922, 927 (9th Cir. 2016). Accordingly, this Court agrees
10 with the *Ducart* and *Frauenheim* courts that Plaintiff’s habeas petitions were mislabeled Section
11 1983 actions.

12 Even if the dismissal of the first habeas petition in *Ducart* were not counted as a strike,
13 because Plaintiff may not have understood the distinction between habeas petitions and Section
14 1983 cases at that time, the second dismissal in *Frauenheim* should still count as a strike because
15 Plaintiff clearly understood the distinction by then. In the first *Ducart* dismissal order, the court
16 explained that a habeas corpus petition was not the proper vehicle for pursuing such claims and
17 that plaintiff should proceed with a Section 1983 civil rights action. The court specifically
18 highlighted the difference in costs of litigation: “the filing fee for a habeas petition is five dollars;
19 for civil rights cases, however, the fee is now \$400 (\$350 if IFP status is granted) and under the
20 Prisoner Litigation Reform Act the prisoner is required to pay it, even if granted in forma
21 pauperis status, by way of deductions from income to the prisoner’s trust account. *See* 28 U.S.C.
22 § 1915(b).” *Id.* Finally, the *Ducart* court highlighted the difference in treatment of dismissed
23 actions, stating “a civil rights complaint which is dismissed as malicious, frivolous, or for failure
24 to state a claim would count as a “strike” under 28 U.S.C. § 1915(g), which is not true for habeas
25 cases.” *Id.* at 1–2.

26 Notwithstanding the *Ducart* courts instructions, Plaintiff then proceeded to file the habeas
27 petition in *Frauenheim* less than a month later, asserting substantially similar allegations as the
28 previously dismissed petition. Therefore, at the time he filed the *Frauenheim* petition, Plaintiff
knew the difference between a habeas petition and a Section 1983 action. Despite having this

1 information, Plaintiff again filed a habeas corpus petition challenging the conditions of his
 2 confinement—including nearly identical allegations regarding seizure of his state appeal
 3 documents—instead of pursuing the action under Section 1983.

4 Under Ninth Circuit authority, such an intentionally mislabeled habeas petition qualifies
 5 as a strike under the PLRA. *El-Shaddai*, 833 F.3d at 1047; *Andrews*, 398 F.3d at 1122 n.12; *see*
 6 *also Heilman v. Deillen*, No. CV 14-6298 JVS (FFM), 2017 WL 10591881, at *7 (C.D. Cal. Sept.
 7 18, 2017) (finding that dismissal of habeas petition counted as a strike where petition asserted a
 8 quintessential 1983 claim, Plaintiff’s previous habeas petitions had been dismissed, and “plaintiff
 9 was specifically advised that his habeas petition was denied because it did not challenge the
 10 legality or duration of his confinement”); *report and recommendation adopted sub nom. Heilman*
 11 *v. Dillen*, No. CV 14-6298 JVS (FFM), 2017 WL 10591880 (C.D. Cal. Nov. 17, 2017).

12 **B. Imminent Danger**

13 Because Plaintiff had at least three “strikes” prior to filing this action, Plaintiff is
 14 precluded from proceeding *in forma pauperis* unless Plaintiff was, at the time the complaint was
 15 filed, in imminent danger of serious physical injury. The availability of the imminent danger
 16 exception “turns on the conditions a prisoner faced at the time the complaint was filed, not at
 17 some earlier or later time.” *Andrews v. Cervantes*, 493 F.3d 1047, 1053 (9th Cir. 2007).
 18 “Imminent danger of serious physical injury must be a real, present threat, not merely speculative
 19 or hypothetical.” *Blackman v. Mjening*, No. 1:16-CV-01421-LJO-GSA (PC), 2016 WL 5815905,
 20 at *1 (E.D. Cal. Oct. 4, 2016). To meet his burden under § 1915(g), Plaintiff must provide
 21 “specific fact allegations of ongoing serious physical injury, or a pattern of misconduct
 22 evidencing the likelihood of imminent serious physical injury.” *Martin v. Shelton*, 319 F.3d 1048,
 23 1050 (8th Cir. 2003). “[V]ague and utterly conclusory assertions” of imminent danger are
 24 insufficient. *White v. Colorado*, 157 F.3d 1226, 1231–32 (10th Cir. 1998). The “imminent
 25 danger” exception is available “for genuine emergencies,” where “time is pressing” and “a
 26 threat . . . is real and proximate.” *Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002).

27 Additionally, there is a nexus requirement between the danger alleged and the claims
 28 asserted: “Thus, in order to qualify for the § 1915(g) imminent danger exception, a three-strikes
 prisoner must allege imminent danger of serious physical injury that is both fairly traceable to

1 unlawful conduct alleged in his complaint and redressable by the court.” *Ray v. Lara*, 31 F.4th
2 692, 701 (9th Cir. 2022). Because Plaintiff is *pro se*, in making the imminent danger
3 determination, the Court must liberally construe Plaintiff’s allegations. *Andrews*, 493 F.3d at
4 1055.

5 Plaintiff’s complaint, which initiated this case in December of 2023, alleges that prison
6 officials and staff violated his constitutional rights by temporarily imposing restrictions on certain
7 Security Threat Groups following a fight between Fresno Bulldog members and general
8 population prisoners at CSATF in November of 2022. (*See generally* ECF No. 1). Plaintiff also
9 alleges that he was denied certain privileges, including yard access, packages, phone calls,
10 canteen, visiting, and certain educational and vocational programs between December 1, 2022
11 and January 27, 2023. Plaintiff alleges that fights in November 2022 and in January 2023 were
12 orchestrated by staff.

13 Such allegations are insufficient to show that there is a real and imminent threat to
14 Plaintiff’s personal safety under the standards described above. As the Court previously explained
15 in its order screening Plaintiff’s original complaint, “Plaintiff does not allege that he was
16 personally at risk of harm or suffered any injuries during either incident”—rather, his claim of
17 injuries are limited to the allegations “that the defendants have caused ‘psychological and
18 emotional trauma.’” (ECF No. 10 at 5, 15, 17). Moreover, the events at issue in this case occurred
19 in December of 2022, and Plaintiff did not file his complaint until a year later, in December of
20 2023, without identifying a new or ongoing risk of injury.

21 Therefore, the Court finds that Plaintiff has failed to demonstrate that he was in imminent
22 danger of physical injury when he filed the complaint. *See Driver v. Pohovich*, No. 2:22-CV-1672
23 DB P, 2023 WL 2394154, at *2 (E.D. Cal. Feb. 1, 2023), *report and recommendation adopted*,
24 2023 WL 8004324 (E.D. Cal. Nov. 17, 2023) (concluding that Plaintiff did not meet the imminent
25 danger exception where “[t]here [was] nothing in the complaint that would indicate plaintiff was
26 under threat of imminent danger based on the excessive force incidents” alleged in the complaint
27 that purportedly occurred about two months before filing the complaint).
28

1 Because Plaintiff is a “three-striker” and was not in imminent danger when he filed this
2 action, the Court will recommend that Plaintiff’s IFP status be revoked and Plaintiff be required
3 to pay the \$405 filing fee in full if he wants to proceed with the action.

4 **IV. CONCLUSION, ORDER, AND RECOMMENDATIONS**

5 The Court finds that under § 1915(g) Plaintiff may not proceed *in forma pauperis* in this
6 action.

7 Accordingly, **IT IS RECOMMENDED** that:

- 8 1. Pursuant to 28 U.S.C. § 1915(g), Plaintiff’s *in forma pauperis* status be revoked.
- 9 2. Plaintiff be directed to pay the \$405.00 filing fee in full if he wants to proceed with
10 this action.
- 11 3. Plaintiff be advised that failure to pay the filing fee in full will result in the dismissal
12 of this case.

13 These findings and recommendations will be submitted to the United States District Judge
14 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty days
15 after being served with these findings and recommendations, Plaintiff may file written objections
16 with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings
17 and Recommendations.” Any objections shall be limited to no more than 15 pages, including
18 exhibits.

19 Plaintiff is advised that failure to file objections within the specified time may result in the
20 waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838–39 (9th Cir. 2014) (citing
21 *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

22 IT IS SO ORDERED.

23 Dated: May 1, 2025

24 /s/ Eric P. Shoup
25 UNITED STATES MAGISTRATE JUDGE
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28